

No More Sacrifices on the Altar of Educational Excellence: ADR & At-Risk Students

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I. INTRODUCTION**

ADR, the more common notation for alternative dispute resolution, has come to mean many things. The field for various dispute resolution processes and professionals has expanded since the 1960s.¹ The mediation of community, business and other types of disputes, has become more commonplace than other forms of ADR.² This is most likely because mediation as a process generally typifies the problem-solving model of ADR, which makes it appropriate for a variety of disputes. Basically any dispute that can or should be negotiated and settled among the parties is amenable to mediation.³

One of the reasons for the resurgence of some forms of ADR and the emergence of new ADR methods is that the traditional adversarial approach of the nation's legal system came under fire for not meeting the needs of the people.⁴ Contemporaneously, the roles of the traditional

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1. See generally STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 1-7 (1985) (discussing the search for alternatives to adjudication since 1960).

2. One such marker of this phenomenon is to note the enormous amount of literature that has been devoted to mediation in recent years past. Also, the number of professionals in the field practicing and organizations promoting mediation has likewise outpaced other forms of ADR.

3. Marsha L. Merrill, *Mediation*, in HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION 38 (Amy Greenspan ed., 2nd ed. 1990).

4. See, e.g., GOLDBERG et al., *supra* note 1, at 4 (noting that an increased volume of legal claims in the 1960s led to judicial congestion, delay, and denial of access to justice); see also Steven S. Goldberg & Peter J. Kuriloff, *Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education*, 42 W. EDUC. L. REP. 491, 492 (1987) (stating that "emerging research . . . suggests that the legal model is inequitable because the outcomes have not been providing a sense of subjective justice for school administrators or parents"); Mark G. Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organization Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891.

"mediating" institutions were waning.⁵ Those traditional mediating institutions included the family, churches, schools, and the community. As people began to look anew at the purposes, goals, and limits of the legal system, they also began to look anew at the multiple processes involved in resolving disputes and at methods of problem-solving. There was also an effort to engage the waning institutions mentioned above once again in the role of problem-solving.⁶ In the 1970s-80s, the nation saw the development of local dispute resolution centers.⁷ The centers were created in part with the philosophy that dispute resolving mechanisms needed to be brought back to the community.⁸ These efforts continue today with what some circles have coined the "ADR Movement."⁹

So what does ADR have to do with at-risk students; what is the ADR/At-Risk Student nexus? This article will explore the benefits of

5. See GOLDBERG et al., *supra* note 1, at 1 (stating that while commercial arbitration and mediation within religious communities have taken place for centuries, new alternative dispute resolution methods are in use today).

6. Cf. GOLDBERG et al., *supra* note 1, at 6. The authors present a skeptical view of bringing back community controlled values and other such lay social control in today's mobile society.

7. See Kimberlee K. Kovach & Marsha L. Merrill, *Community Dispute Resolution Centers*, in HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION 291 (Amy Greenspan ed., 2d ed. 1990) (offering a brief overview of the national development of local dispute resolution centers).

8. For a partial criticism of this philosophy, see Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855 (1985), where the author discusses the differences between a *Geneinschaft* and a *Gesellschaft*. A *Geneinschaft* is a community oriented society whereas a *Gesellschaft* is an individual oriented society. Our society today is more akin to a *Gesellschaft*. The danger comes in trying to bring back to the community certain powers once it has transformed into an individual oriented society. The fear is that weaker parties may be overcome by the stronger, all in the name of social order. This criticism is flawed, however, because it is addressed as limits on dispute resolution centers. It should be more appropriately and validly addressed as limits on mediation, particularly in the case of domestic violence or any other abusive situation.

9. There is a developing culture of ADR, even though alternative methods for resolving disputes are certainly not new. This is perhaps why some refer to the "ADR Movement" as if it is a given. See, e.g., Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 FLA. L. REV. 1 (1985); cf. Madeline Crohn, *Alternative Dispute Resolution: Buzzwords or Movement*, 51 TEX. BAR J. 1143 (1988). Ms. Crohn, in her former capacity as President of the National Institute of Dispute Resolution (NIDR), concludes that ADR is neither a passing fad nor a movement. She concludes that if one uses the traditional definition of movement as being "a series of actions and initiatives directed toward a particular end," then ADR cannot be included. This is because ADR serves numerous ends and is not so narrowly defined. However, perhaps Ms. Crohn would embrace the concept of the developing culture of ADR as long as such included by definition the numerous sub-cultures of ADR that are developing within the culture.

incorporating problem-solving and conflict resolution techniques into schools' programs in grades four¹⁰ through twelve dealing with students who are at-risk of failure or dropping out as defined below. It is important to note that the benefits which inure to at-risk students in such a program are not exclusive and, although beyond the scope of this article, are easily transferable to the whole student body.¹¹

First, at-risk students and ADR will be defined. Who are the students involved? What are the particular processes of dispute resolution that need to be incorporated into the schools' curriculum and why? The larger context of the goals of schools and education in general will be examined: What were they; what are they; and what should they be? What do they mean to at-risk students and the curriculum? This article will then look at what the benefits of ADR, or conflict resolution, are and at how mediation programs on conflict resolution or conflict management can benefit and improve not only the at-risk student body, but also the participating school. Finally, this article will look at what is being done in the schools generally and what can be done. A proposal for incorporating conflict resolution into the school curriculum dealing with at-risk students will be made.

II. DEFINITIONS

At-risk and ADR are multi-faceted terms. Even their general meanings rely on context. Accordingly, it would be helpful to define them most particularly within the context of this article.

A. At-risk Students

An at-risk student can mean many things. When the term is used generally, most people would think of either students at risk of failure or students at risk of dropping out. Those terms can be further delineated.

10. See Albie Davis & Kit Porter, *Dispute Resolution: The Fourth "R"*, 1 J. DIS. RES. 121, 132 (1985) (proposing that fourth or fifth grade is the *earliest* age at which students can comprehend conflict management training in "both theory and practice"). Although other commentators encourage programs in kindergarten through twelfth grade, the programs from kindergarten through third grade should consist of general course content introducing problem-solving concepts. The formal mediation programs should be postponed until the students are able to assimilate such as given above. See also James R. Gabbard, *How Blaming Affects Our Relationships and Alternatives We May Learn*, in EDUCATION AND MEDIATION: EXPLORING THE ALTERNATIVES 63, 65 (Prudence B. Kestner et al. eds., 1988).

11. See generally Davis & Porter, *supra* note 10 (supporting the incorporation of dispute resolution into the whole school curriculum).

Without more, a student at risk of failure is also at risk of dropping out because of such impending or actual failure.¹² By further example, a student who is at risk of becoming pregnant, a parent, a substance abuser, or a delinquent is also at risk of failing or of dropping out or both.

Many states in some limited and vague fashion statutorily address at-risk students in their education laws. Most of those states, statutorily or otherwise, tend to leave the definition of at-risk students to the particular state board of education or other administrative governing body.¹³ Only a few states have embodied a specific definition of what an at-risk student or pupil is in their statutes relating to education. A couple of those states only define at-risk by relying on certain factors or criteria that characterize the particular students.¹⁴ Some states, without defining at-risk per se, do

12. Gary Natrialle et al., *School Reform and Potential Dropouts*, EDUC. LEADERSHIP 11 (1985) (noting that "[i]t is not surprising that students who do not perform well in school seek to leave the environment that provides negative feedback").

13. See, e.g., TEX. ADMIN. CODE tit. 19, § 75.195 (1993). The governing state agency's provision still avoids a complete definition by only assigning factors that may identify a child at risk. The Code's provision in its discussion of at risk does implicitly connect the definition of an at-risk child to be a child at risk of not meeting the requirements for normal promotion. It also further expands on and supplements the state's statutory at-risk factors. Compare TEX. ADMIN. CODE tit. 19, § 75.195 (1993) with the state's other statutory provision, TEX. EDUC. CODE ANN. § 21.791 (West 1992) (presenting legislative findings about the unprecedented social stresses to which school children are subjected).

14. Alabama and Washington are two such states. ALA. CODE § 16-3-17.2(a)(1) (1993) defines:

At-risk . . . as, but not limited to:

- a. Students who are at least two years behind grade level and are, as a result, older than their peers;
- b. Students who have failed to acquire the essential skills needed to stay on grade level;
- c. Students who have a history of adjustment or behavioral problems;
- d. Students who would be placed on long-term suspension for violations of system regulations;
- e. Students who are parents, or who are pregnant;
- f. Students whose high school graduation is in jeopardy;
- g. Students who are considered at-risk as determined by socio-economic productive data; and
- h. Students who have a history of poor attendance

statutorily list similar factors that may indicate when a student is at-risk. Some of these statutory factors will be given below.

Kansas, in its statute entitled "Educational Excellence Grant Program," states that an "[a]t risk pupil means any person who is enrolled in preschool, kindergarten or any of the grades one through 12 [*sic*] maintained by a school district and who is at risk of not meeting the educational goals and objectives established by the school district or of not completing the requirements necessary for promotion to grade level, grade-to-grade promotion, or graduation or of not becoming a productive worker and citizen."¹⁵ The statute embodies the simple and general meaning of at-risk students as being at risk of failure either in school or in the "real world." This risk of failure almost assuredly includes the risk of dropping out. It is interesting to note that implicit in this definition is that one of the attainable goals of educational excellence is being able to provide the opportunity for every student to become a "productive worker and citizen."¹⁶ It is this definition with the assumptions so stated that will set the ground-work for this article.

An Oregon statute defines at-risk children in the context of its state's early childhood education program designed for addressing the at-risk needs of children aged three through eight only.¹⁷ However, its definition of at-risk children, meaning those "children who may have difficulty achieving in school," complements the Kansas definition.¹⁸

WASH. REV. CODE ANN. § 28A.630.756(2) (West 1992) defines at-risk as any student ages 14 through 21:

. . . who meets the following criteria:

- a. The student is one or more grade levels behind in basic skills as determined by placement testing or has not graduated from high school or has not successfully completed the general educational development test;
- b. The student has violated school district or school building rules of conduct on least three occasions in the same school year, is pregnant or is a parent;
- c. The student comes from an historically disadvantaged group; and
- d. The family income level of the student is below the median level for the state

15. KAN. REV. STAT. ANN. § 72-9901(f) (1992).

16. *Id.*

17. OR. REV. STAT. § 343.415 (1991).

18. *Id.* § 343.415(2).

The Kansas statute mentioned above, along with other state statutes, gives numerous factors or indicators for identifying students who are or may be at-risk of failure or dropping out or both. Some of these statutory factors include repeated disciplinary problems,¹⁹ school disinterest or underachievement,²⁰ drug or alcohol abuse,²¹ exposure to an abusive situation,²² poverty,²³ difficulty in achieving in school,²⁴ suspensions or expulsions or both,²⁵ truancy,²⁶ pregnancy,²⁷ parenthood,²⁸ and various other factors related to not achieving expected performance levels.²⁹ This article does not attempt to encompass all of these factors. If a student is at-risk because she is pregnant, offering other programs such as courses in parenting or birth control and providing a day care facility would more appropriately address the factors that make her at-risk. Similarly, if English is the second language, bilingual courses and other institutional support addressing the language deficiency at school and in the home environment would be more appropriate. Instead, this article will deal with students at-risk of failure, dropping out or both because of disciplinary problems,³⁰ low grades, poor achievement levels, poor potential, or actual delinquent behavior.³¹ As will be discussed later, students who fall into these at-risk categories are particularly well-suited to reap the benefits of an early and continuing institutionalized ADR program within their schools.

19. See, e.g., TEX. EDUC. CODE ANN. § 21.791.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*; KY. REV. STAT. ANN. § 157.3175(3) (Baldwin 1994) (identifying at-risk children "based on the Federal School Lunch program eligibility criteria for free lunch"); VA. CODE ANN. § 22.1-279.2 (Michie 1991).

24. See, e.g., OR. REV. STAT. § 343.415.

25. See, e.g., VA. CODE ANN. § 22.1-279.2.

26. *Id.*

27. See, e.g., KAN. REV. STAT. ANN. § 72-9901(f); VA. CODE ANN. § 22.1-279.2.

28. See, e.g., KAN. REV. STAT. ANN. § 72-9901(f); VA. CODE ANN. § 22.1-279.

29. See, e.g., KAN. REV. STAT. ANN. § 72-9901(f); VA. CODE ANN. § 22.1-279.2.

30. See Luleen S. Anderson & Robert J. Limoncelli, *Meeting the Needs of the High Risk, Difficult to Reach Student: Creative Educational Approaches*, 29 THE SCHOOL COUNSELOR 381 (1982) (acknowledging that students with behavior problems are at risk of not only academic failure but also at risk of not developing necessary or "appropriate social skills").

31. Delinquent behavior is conduct that would be a crime if committed as an adult.

B. ADR

As stated earlier, ADR, or alternative dispute resolution, is a multi-faceted term. In this article, ADR will be equated with the process of achieving skills in conflict resolution or more appropriately, conflict management.³² Many of the same skills and methods employed in an interest-based or problem-solving model of mediation would be beneficial to and worth study by any school pursuing an ADR for At-Risk Students Program. This is because mediation is a process whereby a third party neutral or mediator assists the disputing parties in resolving the dispute themselves. The neutral is typically trained to employ problem-solving techniques. The parties, with the help of the mediator, can share information, clarify issues and interests, define the true problem, seek mutual gains, generate possible solutions with all the information, and select the best possible solution that meets the parties' particular needs.³³

The mediation process will usually begin after a commitment to proceed with the sharing of information. One disputant is given the opportunity to state uninterrupted the problem or situation as he or she views it. The other party is then given the same opportunity. With this initial information, the mediator or neutral may ask questions to clarify issues and draw out the parties' interests. The session may be a complete joint session with all parties present throughout, or at some point, the neutral may separate the parties to talk to them individually.³⁴ Whatever format, the session may ultimately take, the process and steps remain the same. With this enhanced information exchange and communication, the problem will become more clearly defined. Once the problem is defined and interests have been identified, the parties, with the mediator's assistance, can seek a resolution that will satisfy everyone. All possible solutions will be generated, and the goal of mediation is that the parties will settle on the best possible solution as they see it. It may not be the best possible solution from the mediator's point of view, but instead it is the best possible solution from the parties' viewpoint. If the parties do not reach a mutual solution to their dispute, the mediator or third party neutral will not impose his or her own solution on the parties.

Quite simply, ADR can benefit students by empowering them to

32. Conflict management is more appropriately coined than conflict resolution because not all conflicts can be resolved in the classical sense, but they can be managed in a civilized society.

33. Merrill, *supra* note 3, at 47; see also CHRISTOPHER MOORE, *THE MEDIATION PROCESS, PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 24 (1986).

34. Caucus is the term used generally to describe the separate meetings between the mediator and one of the parties.

cope in a world riddled with conflict. The study and use of ADR is a quest to find the most appropriate and productive way of dealing with conflict situations.

As used in this article, ADR will be a process, (1) whereby there is a trained student neutral who will facilitate the dialogue between two or more disputing students, more commonly called peer mediation and (2) whereby there is a trained neutral who will facilitate the dialogue between one or more involved students with their teachers or other school administrative personnel or both, referred to as student-teacher mediation.³⁵ The use of ADR to facilitate communication between disputing students and teachers or other adults presents more problematic issues than peer mediation. However, these issues, usually dealing with empowerment, can be addressed once acknowledged, and should not discredit such a program. Additionally, as used in this article, ADR will represent not only the processes mentioned above, but also the institutionalization into the school's curriculum of on-going training and education on the ADR process.

One of the key points to remember when one is talking about implementing an ADR program is that the "A" in ADR is for alternative, not substitute. The program can increase the options for handling disputes without necessarily replacing the more traditional methods employed by the school should the mediation fail in any particular instance.

III. THE GOALS OF SCHOOLS AND EDUCATION

The goal of schools and education is to educate students. It would be nice if the issues were that simple. They never have been and are even more complex today.

One issue in education is the targeted student body. Contrary to historical trends, today's mindset is that all American youth should be educated or at least that our education system should try to do so. Even today there is wide debate over what education could or should do to reach all students through their curriculum.

During colonial and pre-industrial development of America, this

35. M. MELISSA MCCORMICK, *MEDIATION IN THE SCHOOLS: AN EVALUATION OF THE WAKEFIELD PILOT PEER-MEDIATION PROGRAM IN TUCSON, ARIZONA* (1988); see generally Ronald F. Kingsley, *A Peer Connection Program: An In-School Resource for the High-Risk, Delinquency-Prone Students*, 40 JUV. & FAM. CT. J. 25, 25 (1989) (supporting the proposition of the academic and social benefits of "peers helping peers"). Additionally, there is some support for using a co-mediation approach where there are two mediators who jointly handle any particular session.

country could not afford the luxury of sending all its youth to school. In Colonial America, the primary educator was the family, and the schools were not considered a "dominant educational force."³⁶ In fact, this same sentiment that primary responsibility for education should fall on the family was expressed again most recently by President Reagan during his administration.³⁷

It was not until around the mid-1800s that the common school or idea of public and free education for some of the nation's youth came into being.³⁸ The common school's goal of education was to instill patriotism and a sense of loyal citizenry in its students.³⁹ This sentiment still exists today, to some extent, in the public schools. In 1867, the Department of Education was created, and the permanent presence and institutionalization of education began.⁴⁰ At this time, there was still not widespread acceptance of tax-supported, public, secondary-education.⁴¹ Separate trade or vocational schools dominated the secondary level until the turn of the century when the public high school emerged with more of a college preparatory curriculum as opposed to a vocational curriculum. Total student enrollments increased with the development of the common school and even more so with the public high school, until the current state of mandatory attendance for all children was achieved.

36. CHARLES R. KNIKER & NATALIE A. NAYLOR, *TEACHING TODAY AND TOMORROW* 165 (1981).

37. "... President Reagan reiterated his belief that 'parents, not the Government, have the primary responsibility for the education of their children.'" Ellie McGrath, *To Stem a Tide of Mediocrity*, *TIME*, May 1983, at 63, quoted in James S. Catterall & Harry Handler, *The Politics of School Reform*, in *FROM THE CAMPUS, PERSPECTIVES ON THE SCHOOL REFORM MOVEMENT* 194 (Sol Cohen et al. eds., 1989). *Contra* MARTIN R. HASKELL & LEWIS YABLONSKY, *JUVENILE DELINQUENCY* 153 (3d ed. 1982), which acknowledges:

[t]he public school system is that institution which has "officially" picked up the tab for the almost total educational role formerly assumed by the family. The goals that have been assigned to it include the academic, occupational, moral, psychological, and social development of youth to the point where they can assume responsible, fruitful, adult roles.

38. *But see* Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 *HASTINGS CONST. L.Q.* 599, 680 (1992) (noting that "[s]tate laws and masters' rules strictly forbade teaching slaves to read or to write" and adding that although the common school was available to all classes of children it was unavailable to "Indians and Southern blacks"). *Id.* at 689 (quoting JAMES COLEMAN, *EQUALITY AND ACHIEVEMENT IN EDUCATION* 19 (1990)).

39. KNIKER & NAYLOR, *supra* note 36, at 171.

40. *Id.* at 172-73.

41. *Id.* at 173.

In the context of this article, the targeted population for education's goals is all of the nation's youth. All children are entitled to a free and appropriate education.⁴² The Educational Policies Commission in the 1940s echoed this sentiment by stating:

When we write confidently and inclusively about education for all American youth, we mean just that. We mean that all youth, with their human similarities and their equally human differences, shall have educational services and opportunities suited to their personal needs and sufficient for the successful operation of a free and democratic society

This Commission believes that, in the main, educators and lay citizens alike want the schools to extend their services so as to meet all the educational needs of all youth.⁴³

A second, and perhaps more important, issue is what subjects students should be taught. The debate usually centers on support for teaching the pure cognitive tasks, the more traditional role, versus defining the role of teaching and education as defined by the more encompassing social indoctrination and the support functions of schools.⁴⁴ If the school's primary focus is on the cognitive learning by its students without taking into account individual differences in the student population, critics wonder if schools can meet "the overarching objective of education [of developing] children into competent adults capable of functioning effectively in life and in the labor force."⁴⁵ Education is frequently criticized for not achieving or attempting to achieve this overarching objective. Defenders against such criticism argue that too much is asked of an already over-extended system of education if the school must not only be teacher, but also parent, disciplinarian, and instiller of morals; the schools cannot and should not be asked to do it all.

Additionally, schools are still in the throes of what has been coined the "school reform movement," (the movement) precipitated by the 1983 National Commission on Excellence report entitled "A Nation at

42. This is not taken in the vernacular sense, where free appropriate education (FAPE) has become synonymous with the right to education for all handicapped children under 20 U.S.C. § 1414(a)(5).

43. THE DEVELOPMENT OF SECONDARY EDUCATION 303 (1969).

44. Another way to characterize this debate is the three "R's" (reading, writing & arithmetic) versus what critics would say has become the parenting role of schools.

45. Hugh B. Price, *The Bottom Line for School Reform*, PHI DELTA KAPPAN, Nov. 1990, at 242-43.

Risk: The Imperative for Education Reform."⁴⁶ The movement has advocated that academic excellence be sought and achieved.⁴⁷ This excellence is typically measured by how well students perform on various achievement levels and tests. This interpretation of excellence has also been seen as breaking away from the ideas of equality in education.⁴⁸ Even though the dream of academic excellence still continues to be measured mostly in cognitive or "result-based"⁴⁹ terms, it is important to remember that "A Nation at Risk," from which the movement was borne, was grounded on the concern that the United States was not creating a work force capable of competing in the future world market.⁵⁰ "The goal was the upgrading of all students."⁵¹ This upgrading was not to be measured solely by tests, but by the development and education of a future workforce that could compete in the expanding world market.⁵²

Notwithstanding the movement, or more likely because of it, what is still subject to heightened debate is how to achieve educational excellence and to meet the educational needs of all students. Consider the following commentary on the quest for academic excellence:

Taken together, the call for higher standards in curriculum content, learning time, and achievement levels seems to be based on five assumptions: (1) current standards are too low, (2) more demanding content and more time allocated to school will lead to greater individual student effort, (3) greater student effort will lead to improved achievement, (4)

46. NAT'L COMM'N ON EXCELLENCE IN EDUC., U.S. DEPT. OF EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983) [hereinafter *A NATION AT RISK*]; see, e.g., Sol Cohen & Lewis C. Solmon, *Introduction: A Role for Faculties of Education*, in *FROM THE CAMPUS, PERSPECTIVES ON THE SCHOOL REFORM MOVEMENT 1* (Sol Cohen et al. eds., 1989) (dating the beginning of the movement).

47. See generally *FROM THE CAMPUS, PERSPECTIVES ON THE SCHOOL REFORM MOVEMENT* (Sol Cohen et al. eds., 1989) (offering an interesting collection of pieces from different viewpoints on the reform movement and its meaning and implications).

48. Carl Weinberg, *Neo-Humanism and Educational Reform*, in *FROM THE CAMPUS, PERSPECTIVES ON THE SCHOOL REFORM MOVEMENT 47* (Sol Cohen et al. eds., 1989).

49. See Judges, *supra* note 38, at 704-706 (discussing the reform movement precipitated by *A NATION AT RISK* as one of "result-based reform," *supra* note 46). The measurements of success or failure are based solely or primarily on standard performance levels. Professor Judges criticizes such testing as it only earmarks the downward spiral for and failure of a disproportionate representation of the lower socio-economic class. This measurement and failure not only preclude educational opportunity, but employment as well. *Id.*

50. *A NATION AT RISK*, *supra* note 46, at 5.

51. Weinberg, *supra* note 48.

52. See *A NATION AT RISK*, *supra* note 46, at 7.

the relationships between standards and effort and between effort and achievement will hold for all students, and (5) no negative consequences will be associated with the more demanding standards. These assumptions, like the specific commission recommendations based on them, fail to consider our population of at risk--potential dropouts.⁵³

One problem with these assumptions is that they assume all students will react the same to heightened standards. Indeed, there is little argument that minimum standards of performance often tend to set the norm.⁵⁴ This logic, thus, tends to support the use of heightened standards. If the standards are raised, so is the norm. The flip side is that studies have also shown that students at risk of failure do not perform better after failure because they have ineffective "problem-solving strategies."⁵⁵ They are not able to perform as successful learners who do better after failure because successful learners know how to achieve success by putting forth more appropriate effort whereas students at-risk do not.⁵⁶ Heightened standards alone, without appropriate support, both remedial or otherwise, are meaningless, particularly to the at-risk student population. The question is whether some students must be sacrificed on the altar of educational or academic excellence. Some people would say "yes" while this author among others, would urge "no."

Issues of diversity, equality, and appropriate methods of achieving educational goals, once the goals are defined, further complicate the matter. In fact, the issues may be more troublesome because of the heterogeneous cultures and the mobility of society that symbolize America today. These issues will continue to present themselves in the future unless and until they are appropriately addressed. Some predict that these problems will increase.⁵⁷ It is the premise of this article that the implementation of ADR programs for at-risk students can at least address and respond in part to issues of diversity, equality, and appropriate methods of achieving the educational goals.

This article will borrow from a 1911 Report of the National Educational Association in its assumption of the goals of education. It is

53. Natrialle et al., *supra* note 12, at 12.

54. Weinberg, *supra* note 48, at 41.

55. Renée Stevens & R.O. Pihl, *The Identification of the Student At-Risk for Failure*, 38 J. CLINICAL PSYCHOL. 540, 541 (1982).

56. *Id.*

57. Judges, *supra* note 38, at 693-94 (noting that if educational disadvantage stems from deficiencies in schools, families, and communities, then the problems for students are likely to increase).

the goal of education to "return to society intelligent, able-bodied, and progressive citizens [by laying] the foundation of good citizenship [and by helping] in the wise choice of vocation."⁵⁸ It is also a goal of education to "make specific contribution to the efficiency of the individual along various lines."⁵⁹ Said goals recognize that "the development of individual aptitudes and unique gifts is quite as important as the development of the common elements of culture."⁶⁰ Admittedly, this is a humanistic view of the goals of education.⁶¹ Implicit in these goals is a charge to the schools to acknowledge and embrace the diversity of aptitudes and to try to make their students, at-risk or not, the best they can be, whatever that may be.⁶²

IV. HOW CONFLICT RESOLUTION PROGRAMS CAN BENEFIT AT-RISK STUDENTS AND ADDRESS THE SCHOOL'S GOALS

At-risk students to some extent are a product of a heterogeneous, mobile, and consumer driven society. Students who come from poorer socio-economic, black, hispanic, or other racial minority cultures present higher probabilities of being at risk.⁶³

58. For an excerpt of the report, see *supra* note 43, at 98-99. *Accord Price*, *supra* note 45 and accompanying text.

59. See *supra* note 43, at 99.

60. *Id.*

61. See generally Weinberg, *supra* note 48, at 35-50. This humanistic viewpoint sees all children capable of learning if we can find the right methods to address their particular learning styles.

62. For a related view, compare with Charles W. McMasters, *Mediation: New Process for High School Disciplinary Expulsions*, 84 NW. U. L. REV. 736, 752 (1990). McMasters echoed this sentiment by commenting:

[t]oday schools still play a vital role in preparing students to function effectively in society. Secondary schools are expected to help students proceed to higher education or work. The school's purpose is not merely to provide courses but to *facilitate the student's assimilation into society*. This interest has been emphasized - by educators and courts - as a priority of the education system.

Id. (emphasis added).

63. The literature is replete with listing the status of being from the lower socio-economic class as also being a factor indicating the increased possibility of being at-risk. Additionally, the fact that one comes from a minority culture also increases the chances of being in the at-risk category. See, e.g., Barbara Z. Presseisen, *Focus on the At-Risk Learner: An Introduction*, in AT-RISK STUDENTS AND THINKING: PERSPECTIVES FROM

The at-risk population has also been characterized as one of low self-esteem.⁶⁴ Recognizing this, West Virginia statutorily mandates that schools' programs addressing homeless and at-risk children "shall include . . . ideas of . . . self-esteem enhancement."⁶⁵

Mobile society has created fewer cohesive community values. There is no sense of belonging to a community, because either the community is always changing for the non-mobile or one community replaces another for the mobile.

We have also become a nation of great consumption. With various media hyping this consumption twenty-four hours a day, seven days a week, the differences between the have and have-nots are more pronounced than ever. There appears to be no change in sight. For many, particularly those at the lower end of the socio-economic scale, including at-risk students, there is "no *esperanza*"⁶⁶ or chance of ever being one of the haves instead of have-nots. Why try if you will never succeed? As a nation, we focus on the winners, the tops, the best; they are our heroes. This focus presents a distorted view of reality and again reinforces the have-nots' dilemma. The schools' use of testing, grading, labeling, and valuing of sports and competitive activities, while somewhat

RESEARCH 11 (Barbara Z. Presseisen ed., 1988).

64. See Natrielle et al., *supra* note 12; Kathy R. Thornburg et al., *Youth at Risk: Society at Risk*, 91 ELEM. SCHOOL J. 199, 203 (1991).

65. W. VA. CODE § 18-8A-1(a) (1992). The complete sentence reads "Programs shall include, but not be limited to, incorporating the ideas of academic achievement, career exploration, self-esteem enhancement, behavior modification and other programs relating to student development."

66. "No *esperanza*" is Spanish for "no hope." It was first described to this author by Joey Cavazos, a juvenile probation officer, speaking to a juvenile law class. He attributed some of the delinquent behavior by children as resulting from the lack of hope or change in their socio-economic situation. The problem with delinquency could not be fully addressed unless we, as a society, addressed the problem of "no *esperanza*." Compare this notion of "no *esperanza*" with Arthur L. Stinchcombe's notion of "rebellion":

Rebellion . . . occurs when future status is not closely related to present performance. When a student realizes he has not achieved status increment from improved current performance, current performance loses meaning. The student becomes hedonistic because he does not visualize achievement of long run goals through current self-restraint. He reacts negatively to a conformity that offers nothing concrete. He claims autonomy from adults because their authority does not promise a satisfactory future.

HASKELL & YABLONSKY, *supra* note 37, at 153 (quoting ARTHUR L. STINCHCOMBE, *REBELLION IN A HIGH SCHOOL* 5 (1964)).

necessary, helps to perpetuate this dilemma.⁶⁷

Also, the thrust of secondary education, basically unchanged since the inception of the public high school, to be college preparatory, by definition excludes large segments of the student population, including most at-risk students.⁶⁸ The non-college bound have been lost to a greater or lesser extent with the development and status quo perpetuation of public secondary education. This sentiment is echoed in one of the more common criticisms of schools: Schools are just not culturally oriented towards the have-nots, the disadvantaged child.⁶⁹ The school reform movement has, unintentionally or otherwise, also exacerbated this dichotomy. Children at the lower end of the socio-economic scale are not invested in at the schools in order to meet the reform movement's markers of achievement.⁷⁰ Indeed, one commentator details the problems of education and the poor with the former creating a caste society of the latter.⁷¹ Additionally, the have-nots and the disadvantaged child are more likely to be at-risk than the haves.⁷²

Although schools have not entirely abandoned the at-risk student through their curricula, they can and should do more. One positive step in that direction is to incorporate an ADR program into the school environment. Conflict resolution processes and the skills employed emphasize values that can be embraced by all regardless of labels. Appropriately applied, ADR breaks down barriers and benefits everyone. It can produce a model for future behavior that is more productive. ADR can be a model for success.⁷³ This model for success is empowering and

67. See generally Daniel J. Kaczjynski, *What Can Traditional High School Dropouts Tell Us About Alternative Education*, in 2 READINGS ON EQUAL EDUCATION, QUALITATIVE INVESTIGATION INTO SCHOOLS AND SCHOOLING 31-32 (Michele Foster ed., 1991) (discussing the impact of dividing students in school according to their academic worth, the best students getting the best of the resources and the worst students being segregated out, and how this labeling and division of resources according to such labels perpetuates the dropout problem as an "accepted practice" in education).

68. Jerry Downing & Thomas C. Harrison, *Dropout Prevention: A Practical Approach*, SCHOOL COUNS., Sept. 1990, at 67, 68.

69. See S. ALAN COHEN, *TEACH THEM ALL TO READ, THEORY METHOD, AND MATERIALS FOR TEACHING THE DISADVANTAGED* 13 (1969) (describing schools as a "middle class establishment" that works to the disadvantage of the poor who are denied opportunities "to participate fully in the mainstream of American culture").

70. See Judges, *supra* note 38 and accompanying text, *supra* note 49.

71. Judges, *supra* note 38. Professor Judges' entire article puts forth this proposition.

72. *Id.* at 693-94.

73. See Davis & Porter, *supra* note 10, at 125-26.

can reinforce positive self images.⁷⁴ This is perhaps why one writer has coined schools the "perfect environment for ADR."⁷⁵ Not only the handling of disputes referred to the ADR program, but perhaps more importantly, the accompanying and ongoing training in conflict management will benefit the at-risk students and the schools.

One of the important messages an ADR program can send is to redefine conflict as good.⁷⁶ The very term conflict conjures up negative images, and accordingly, conflict is something to be avoided at all costs. In fact, when this very same issue was presented to students, one of the images that came to many of the students' minds was divorce.⁷⁷ While most may believe that divorce is necessary in some instances and that it is here to stay, no one would urge that divorce is good. Conflict is also here to stay, but some conflict is necessary and is good. Growth as individuals and as a society can come by an exchange of ideas born of conflict.⁷⁸ Imagine a world without conflict, and the image, although peaceful, is dull.

74. See, e.g., Thornburg et al., *supra* note 64 and accompanying text. Given the premise that the at-risk population can be characterized by low self-esteem, any program that can develop self-esteem will be beneficial to at-risk students. A review of several schools' programs demonstrate that an ADR program can serve such an end. See, e.g., MCCORMICK, *supra* note 35, at 4 (discussing an Albuquerque, New Mexico school's report of students developing a "greater sense . . . of self-esteem" from participation in a school-based mediation project). See generally JULIE A. LAM, THE IMPACT OF CONFLICT RESOLUTION PROGRAMS AND SCHOOLS: A REVIEW AND SYNTHESIS OF THE EVIDENCE (Nat. Ass'n for Mediation in Educ. ed., 2d ed. 1989) (indicating that many of the 14 school programs detailed in the report noted an increase in students' positive self-images); Linda Singer et al., *Alternative Dispute Resolution and the Poor, Part I: What ADR Processes Exist and Why Advocates Should Become Involved*, 26 CLEARINGHOUSE REV. 142, 147 (1992) (citing such improvement of self-image as "[t]he programs' most dramatic effect").

75. McMasters, *supra* note 62, at 737-38. Compare *id.* with Yudof, *supra* note 4 (supporting such a proposition); Accord Yudof, *infra* note 106 and accompanying text.

76. See Terry Amsler & Gail Sadalla, *Understanding Conflict*, in EDUCATION AND MEDIATION, EXPLORING THE ALTERNATIVES 47 (Prudence B. Kestner et al. eds., 1988). The authors talk about the positive value of conflict. Conflict can help parties to "learn new and better ways to respond to problems; build better and more lasting relationships; [and] learn more about ourselves and others." *Id.* The benefits will only definitely accrue if the conflict is handled appropriately. Of course conflict can still be handled inappropriately, and, upon reflection, the same positive values mentioned above may be forthcoming.

77. Verna M. Cavey, *Talking with Middle-School Students about Conflict*, Presentation Summary, in EXPANDING HORIZONS: THEORY AND RESEARCH IN DISPUTE RESOLUTION 230-31 (Thomas F. Christian, et al. eds., 1989). Ms. Cavey noted in her interviews with students that "conflict" was always perceived as more "intense and difficult" than mere "problems." *Id.*; accord Amsler & Sadalla, *supra* note 76, at 48, (indicating that students equated conflict with "anger," "hostility," "violence," and "hate").

78. See Davis & Porter, *supra* note 10, at 123-24.

An ADR program can demystify conflict, showing students how to adapt, grow, and learn from it.⁷⁹ Instead of using the original dispute resolution, students will learn to think through situations and articulate their feelings. Indeed, studies have shown that at-risk students who participate in such programs directly benefit by adopting and incorporating a more socially acceptable attitude regarding conflict.⁸⁰ Development of appropriate coping skills can only help at-risk students stay in school and later help them survive in the work environment, both of which achieve the educational goals.

An evaluation of a pilot peer-mediation program in one of Tucson, Arizona's junior high schools delineated five basic conflict styles: aggressive, avoidance, submissive, compromise, and collaborative.⁸¹ In addition to assessing the effect on the at-risk population, one of the program's goals was to move all of the participating students towards approaching conflict in a more collaborative manner as opposed to the other four conflict styles.⁸² The report noted a resulting increase in the use of the collaborative conflict style by those affected.⁸³ The collaborative style was defined in the report as representing the "desire to attain a solution that will meet the needs of both people."⁸⁴

This collaborative style represents exactly one of the goals of interest-based mediation.⁸⁵ The mediator, through active listening, questioning, and issue clarification, seeks to illicit the parties' true interests.⁸⁶ Once these interests are brought out into the open, the mediator facilitates the interactions to enable the parties to discover whether there is any merging of the interests or any way both parties' needs may be mutually addressed and met. One classic example⁸⁷ is the

79. See, e.g., Albie M. Davis, *Teaching Ideas, Dispute Resolution at an Early Age*, 2 NEGOTIATION J. July 1986, at 287, 289.

80. MCCORMICK, *supra* note 35, at 65-67.

81. *Id.* at 33-34.

82. *Id.* at 33, 66-67.

83. *Id.* at 65-67.

84. *Id.* at 34. This is not unlike the sister and orange example. See *infra* notes 87-89 and accompanying text.

85. Interest-based mediation is based on principles very similar to those of principled negotiation or negotiation on the merits detailed in *Getting to Yes, Negotiating Agreement Without Giving In*. ROGER FISHER & WILLIAM URY, *GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN* 86 (Bruce Patton ed., 1981); see also Robert Fisher & William Ury, *Principled Negotiation*, in GOLDBERG et al., *supra* note 1, at 93-94 (arguing that in presenting each side's problems to the other as an independent third party, a mediator acts as a principled negotiator would).

86. See discussion *supra* part IIB.

87. See GOLDBERG et al., *supra* note 1, at 15.

orange that both sisters want. An easy compromise would be for each to get half. But look at their interests and one may discover one sister wants the rind for a cake recipe, and the other sister wants it for orange juice. In this particular example, the mediator did not discover any merging of interests per se, but instead discovered that there were no conflicting interests as had initially appeared. Discovering why each wanted the orange allowed for both sisters' interests to be met completely.⁸⁸ This came only after inquiry past the sisters' original positioning or "I want the orange." The inquiry identified why they were taking their respective positions. Positions are what one wants while interests are why one wants it.⁸⁹ An interest-based model of mediation and a collaborative approach to conflict both emphasize the importance of getting to the "whys?" of all parties' positions. The inquiry would not be complete without it.

It is very clear from the mere labeling of conflict styles that this collaborative style of dealing with conflict is preferable to the aggressive, avoidance, and submissive styles.⁹⁰ It becomes clear from the orange example cited above that the collaborative style of dealing with conflict is also preferable to the compromise style.⁹¹ Compromises are not always the most creative solutions to particular problems. Compromise solutions may truncate a more complete inquiry into people's true interests. In the school environment, absent a collaborative approach, critical inquiry is cut short, as is the student's ability to fully think through all the issues presented.

88. But cf. Robert J. Condlin, *Bargaining in the Dark, the Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MARYLAND L. REV. 1, 47-49 (1992) (commenting on the overly simplistic and incomplete analysis of which this problem-solving theory has been developed thus far in the legal scholarship of negotiation). However, this example, simplistic as it may be, illustrates the value of moving beyond positions into interests in order to effectuate a more appropriate resolution of any dispute.

89. FISHER & URY, *supra* note 85, discussed in GOLDBERG et al., *supra* note 1, at 19.

90. At least it is clear to this author. The aggressive style was defined in the report as "a desire to defeat the other." MCCORMICK, *supra* note 35, at 34. It typifies a kind of win, no matter who is right, philosophy and in school age children it typifies a "hit them first" philosophy as described in the report. *Id.* This conflict style will not only not help manage the conflict, but will tend to escalate it. The avoidance style was defined in the report as representing "a desire to withdraw from a conflict." *Id.* Although this may be a preferable short-term solution to conflict, it can have negative long-term effects. Finally, the submissive style is defined in the report as representing "a desire to acquiesce to the other's concerns at the costs of one's own interests." *Id.* Similar to the avoidance conflict style, the submissive style may be beneficial in the short-term, but detrimental when looking at the long-term effects.

91. The compromise style typifies "a desire for both people to give up something in order to reach an agreement." MCCORMICK, *supra* note 35, at 34. It reflects Solomon's solution of splitting a baby.

ADR & AT-RISK STUDENTS

An ADR program instituted early and reinforced continually through every subsequent grade level to grade twelve will allow for the at-risk population to adopt a collaborative conflict style that will not be left on the school house steps.⁹² Students should carry it into other aspects of their lives when dealing with conflict. The reinforcement of programs carried from one grade level to the next will ensure that ADR is incorporated into the students' psyche -- a kind of behavior modification result. Adopting a collaborative style of dealing with conflict also sharpens one's analytical and critical thinking skills. This should carry over into the classroom, improving the at-risk students' chances of success.

It also must be noted that benefits reaped from such programs appear to be greater to the participants: both to the mediators and to a lesser extent, to the disputants.⁹³ It is for this reason that at-risk students should be encouraged by the schools to be trained and utilized as mediators.⁹⁴ They should be providers as well as consumers of the services. The students trained as mediators will not have to rely on learning the problem-solving skills and reaping the benefits thereof by the modeling approach. They will be trained in the skills in an ongoing fashion and instead be the ones who model the desired skills for others.

There are additional benefits to including at-risk students in the mediator training. This is especially true if the training is incorporated into the curriculum and is ongoing throughout the various grade levels. It will not actually matter if the students ever get the formal opportunity to mediate or to be disputants. The ongoing training should include discussion of conflict styles and conflict management, creative thinking and listening, as well as numerous role plays where the students can develop and sharpen their skills as mock mediators and disputants. There will be plenty of opportunity to utilize the acquired skills less formally,

92. See, e.g., *id.* at 30, (basing "the peer-mediation approach on the belief that properly trained student mediators are capable of guiding student disputants through the problem-solving process and that *most students can internalize the problem-solving process*" (emphasis added); accord LAM, *supra* note 74, at 36, (noting that a teacher in one of the programs indicated that there are potential positive effects if children "can be encouraged to continue to develop those skills"). One way to accomplish this would be to carry it throughout their education.

93. See MCCORMICK, *supra* note 35, at 67 (comparing those at-risk students who participated in the program as mediators and developed "pro-social" attitudes toward conflict, with those who participated as disputants and maintained their "anti-social" attitudes toward conflict); LAM, *supra* note 74, at 39.

94. MCCORMICK, *supra* note 35, at 67; see also Singer et al., *supra* note 74, at 147 (describing a New York City school's mediation program's "most dramatic effect [as improving] the self-image of the students *who serve as mediators*") (emphasis added).

mediating real life situations either at home, play, or in school. Trained student mediators will reap the benefits of adopting a more collaborative style of conflict management; of sharpening analytical, listening, and critical thinking skills; of improving one's communication skills; and of raising self-esteem and feelings of empowerment. These are all beneficial to the school learning environment.

The general problem-solving skills that one learns from actively participating in mediation include active listening and creative thinking, which should make the participants better learners.⁹⁵ The mediator should be trained in active listening skills. By echoing back what he or she hears, the mediator will model back these skills for the disputants. Creative thinking stems from the mediation skills that seek to redefine the problem, to find mutual interests, or to expand the possible areas of agreement.⁹⁶ Students who have been trained and who use the program will have no choice but to think beyond the surface "this is what I want" or "I've always been this way." The mediation process develops new thought mechanisms to scrutinize old viewpoints and to develop new, more productive ones.

Developing a more collaborative, problem-solving style of dealing with disputes also improves communication skills, essential skills in education. Disputants will be asked to verbalize their positions and interests. One-liners will no longer rule the day. Mediators will be trained to facilitate the dialogue. They will probe beyond the disputants' initial statements. Exposed at-risk students will begin to process and articulate their feelings in appropriate ways because the mediation forum legitimizes their feelings by exploring everyone's interests.

Often, children may feel marked as either "good," "bad," "smart," or "stupid." This is probably even more true of the at-risk student population, which might feel more segregated from the achievers in the school environment. Another stigma attaches if the at-risk population is also typified by coming from the lower socio-economic class. The mediation process can break through these labels by providing a forum for open and searching discussion without incrimination and without fingerpointing in the context of the particular dispute. If appropriate in a given session, the students will be able to see that perhaps their particular

95. Davis & Porter, *supra* note 10, at 127.

96. See, e.g., Albie Davis & Richard A. Salem, *Resolving Disputes, The Choice is Ours*, in EDUCATION AND MEDIATION: EXPLORING THE ALTERNATIVES 136 (Prudence B. Kestner et al. eds., 1988) (stating the proposition that "if students become aware of the various ways that conflict can be addressed, they will be better equipped to develop flexible innovative responses"). Again, these skills are modeled back to the disputants from the mediators.

responses to particular stimuli are inappropriate without having to be burdened with labels of "bad" or "stupid." There are no bad or stupid children, only bad or stupid actions.

The same is also true in the student-teacher mediation context. The school, without invalidating its authority, is given a mechanism to back down from what may have been an inappropriate or less appropriate response in a given situation with the particular student. The benefit to the students in such situations, no matter what the particular outcome, is that their voices are heard. They are part of the process called education.

This participating in process, both through the curriculum in training and through dispute resolving, will help the at-risk student develop requisite learning skills.

Students, it is presumed, will better understand subject matter that can be integrated into their experiential base and expressive needs. To establish curricular strategies that achieve such an integration, it would take a more imaginative and creative teacher than those who are trained to be satisfied with presenting knowledge as abstract and detached pieces of information.⁹⁷

An ADR program is just such a curricular strategy. It brings relevant, real life experience into the information imparted. Quite frankly, meaningful tasks are learned more effectively.⁹⁸ Additionally, this active participation is preferable to the passive reception of knowledge.⁹⁹

The disputants are equally given the power to fashion their own resolution to the problem. A resolution is not imposed if one is not forthcoming from the parties' own agreement. Accordingly, most parties are more satisfied with the outcome than if one had been imposed upon them. Of course, in the school environment, there may be a resolution imposed outside the mediation process if one is not forthcoming.¹⁰⁰ This might provide an extra incentive for the disputants to reach a mediated resolution.¹⁰¹ This could also be described as coercive depending on the factors involved. In the instances of student-teacher mediation, one might argue this coercive nature creates a further power imbalance between the student and involved school personnel. However, sometimes this mild

97. Weinberg, *supra* note 48, at 49.

98. See generally COHEN, *supra* note 69, at 230, (discussing the "Laws of Learning").

99. *Id.* at 231.

100. This is not atypical of court-annexed ADR in general.

101. *Id.*

coercive nature of the choice of options simply makes an unwilling participant a truly willing participant who is ultimately satisfied with the process.

Parties who are more satisfied with the outcome, and who, through participation, have "ownership" of the result, are more likely to abide by the outcome. This give and take into the process and outcome follows from one of the basic tenets of negotiation.¹⁰² The give and take that accompanies negotiation in some form or fashion is essential in order to allow the parties to have "ownership" of or commitment to the result or agreement. The stability of any forthcoming agreement from negotiation is always at risk of breaking down after the handshake if one party ignores the agreement and demands that all concessions flow his or her way. Mediation embraces agreement and this is why most successful mediations withstand the test of time.

The improved communication, input into process and solution, and legitimization of conflict and feelings, all empower the involved individuals. The students will be encouraged through training and the mediation process to exercise autonomy with a sense of self-determination and control.¹⁰³ This by-product of mediation and mediation training is particularly important to at-risk students who may view the education process and the world in general as disempowering.

It must be noted that this empowerment function of mediation is not without its critics. Some argue that mediation cannot appropriately empower those where there is a gross or disparate power imbalance between the parties. A large proportion of the literature addressing this concern does so in the context of divorce mediation, especially when there

102. Cf. JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION 125-26 (1988) (discussing the problems of bouldwarism through an actual case example). Bouldwarism is where one of the parties in negotiation comes in with its first offer as its last. The party is doing so because it has decided this is what a fair and reasonable result should be. The problem with a bouldwarism strategy is that it either forces one side to make all the concessions, ignoring the basic negotiation tenet described *infra*, or it is the bargaining point from which one bargains down. In the example cited by the authors, the union was basically forced to make all the concessions to the company. However, although the negotiations had ended with what appeared to be a resolution, the union at the same time filed an unfair labor grievance. Had management allowed for the give and take into the process, they might have worked out an agreement that both parties could live with and without the union filing a grievance before the National Labor Relations Board. Cf. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 80 (1983) (stating that "concessions are important devices because they are the primary means by which agreement can be approached").

103. See, e.g., Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267-68 (1989) (discussing "the empowerment function of mediation").

are allegations of abuse, either physical or emotional.¹⁰⁴ No matter what the context, the concerns about empowerment usually center around the premise that the less empowered are opting out of a more legalistic, rights-oriented, and therefore more protective process, to a private forum where they will be taken advantage of by the stronger party. If this is the case, then the critics would urge that mediation is inappropriate.

It is clear in the student-teacher mediation setting that there should be concerns about the power imbalance between the student and the institution. The literature has usually addressed this issue of use of alternatives in the school setting where students have legalistic due process rights, such as in proceedings concerning special education and expulsions.¹⁰⁵ The conclusions presented in the literature endorse, either

104. For an excellent article on some of these concerns and how they relate in particular to women's issues, see generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). Many of the concerns mentioned in the article are easily applicable to any class of people who are traditionally disadvantaged and disempowered. Notwithstanding Professor Grillo's concerns, the article should not be interpreted as an anti-mediation piece. *Contra* Ann Milne, *Mediation - A Promising Alternative for Family Courts*, JUV. & FAM. CT. J. 61, 71 (1991). Ms. Milne asserts that power imbalances are present in most relationships and that the process of mediation works to put parties on par with each other, whereas the legalistic adversarial system does not protect the weaker party. Instead, the weaker party can be worn down by the stronger in an adversarial system. Milne states:

An imbalance of power between the parties is often central to the debate regarding who should and should not mediate. This objection to mediation is frequently raised by feminist groups and advocates for victims of domestic abuse. Diversity of power is central to most relationships. Rarely are two individuals evenly matched in skill and background. Whereas the adversarial system is predicated on the assertion of one individual over another through displays of power, wearing the other party down and putting forth a better case; a mediator, on the other hand, assists the parties in combining their strengths toward the goal of resolving an issue and educates parties to effectively use their strengths for settlement as opposed to dominance. In sum, power imbalances in relationships are a given. Mediation provides a means of addressing and managing these issues with the parties to effect an agreement-producing process.

Id.

105. See Goldberg & Kuriloff, *supra* note 4, at 492. Dr. Goldberg and Dr. Kuriloff discuss developing studies that indicate the failures of the special education due process hearing as not "providing a sense of subjective justice" for either the school or parents of the student. The due process model does not build back in trust to the system once a problem develops and may be inappropriate to resolve these issues. *Id.* The authors call for further research and specifically mention the favorable reports that mediation as an alternative has earned to date. *Id.* at 495; see also McMasters, *supra* note 62, at 762. Mr. McMasters

explicitly or implicitly, the use of mediation as an appropriate method for resolving issues in the school environment.¹⁰⁶ This endorsement is forthcoming because of the failings of what the due process model has to offer the participants in such settings. As one of the authors noted about the due process model, "Give him a fair trial, then hang him."¹⁰⁷

Mediation can succeed and can meet all of the participants' interests even with an apparent power imbalance. In the school environment, it actually can work to level the playing field where the students will come out of the process with a feeling of "subjective justice."¹⁰⁸ This sense of justice and rebuilding trust into the school environment¹⁰⁹ can stem from the participatory input that a mediation program encourages.

favorably concludes that mediation should be incorporated into the due process expulsion model in order to foster active participation by both the school and student. Mr. McMasters specifically mentions the power imbalance between school and student by noting that the school can yield no more power over the student through mediation than it could at a more formal expulsion hearing. *Id.* at 769. Although this assertion may beg the issue, it is still with some merit. Compare with Yudof, *supra* note 4. Professor Yudof looks at the legalization model in the school setting by borrowing from organizational theory and discusses both the model's and theory's implications on the trust or distrust of authority. Professor Yudof notes that formalization may heighten the impersonality of superior-subordinate relations and undermine the informal feedback so necessary to get at the cause of tensions. *Id.* at 892. Additionally, a legalistic or due process model with strict adherence to rules and procedures may create a cycle of distrust and formalization which ultimately undermines the organizational goals. Professor Yudof, too, talks about subjective justice. However, he cautions that nonformalism is based on trust and that there is no current trust in today's school environment. (It must be noted the article was written in 1981, but his statement of the school environment still holds true today.) Professor Yudof's above-stated premise about nonformalism and lack of trust, however by his own admission does not preclude the fact that perhaps nonformalism may build back in the trust in order for there to be the necessary balance between formalistic rules and other forms of social control. By inference, Professor Yudof concludes as he began, with the endorsement that mediation may "restore the openness and personal interaction so necessary for trust." *Id.* at 893.

106. See Goldberg & Kuriloff, *supra* note 4, at 496 (arguing that a system that allows the concerns of parties to be expressed in a non legal forum within schools is the best way to promote trust between parents and the school administration); Yudof, *supra* note 4; McMasters, *supra* note 62, at 771-73.

107. Yudof, *supra* note 4, at 902 (citing J. Bible, SURVEY OF TEXAS SCHOOL TRUSTEES, SUPERINTENDENTS, PRINCIPALS AND TEACHERS (1978) (unpublished manuscript on file at the Wisconsin Law Review)).

108. See Goldberg & Kuriloff, *supra* note 4, at 495; Yudof, *supra* note 4.

109. See Yudof, *supra* note 4, and accompanying text, *supra* note 105, for a discussion of building back trust with a subjective sense of justice into the school environment. See also Lon L. Fuller, *Mediation -- Its Forms and Functions*, 44 SO. CAL. L. REV. 305, 315 (1981). Professor Fuller believes that social order can be imposed and arise directly out of mediation which claims no "authority." *Id.*

Additionally, in dealing with a generalized ADR program for at-risk students, the precipitating incident that will be referred to mediation often will not involve a correlative right to an elaborate due process proceeding. Absent the program, the matter may otherwise be handled less effectively, informally, or even ignored.

Also, a major, or at least equal component of the proposed program, the inclusion of ongoing training in the curriculum content in order to benefit the at-risk student, has no involvement with concerns about opting out of a due process model. The training of both students and school personnel should sensitize the parties to the goals of mediation along with its limitations. Hopefully, with appropriate training and institutional support and encouragement, there will be no manipulation of the process by any of the parties. At a very minimum, the mediator or third party neutral should protect the process in any given situation, which could include private caucuses with the parties or a decision to terminate or postpone the mediation or both.

Part of the empowerment in the ADR process is derived from the participatory nature of mediation and its training. In the school environment there is a community of participants. The goal of the community is to educate or foster the development of its students. The community is better served when it can rely on informal measures to maintain social order.¹¹⁰ Students, through their participation in the ADR program, are given a stake in the maintenance and positive development of the community.

The mediation of disputes and this empowering process, whether it is between other students, teachers, or other school administrative personnel, does not mean that the students are not held accountable when they need to be. Instead, if successful, they are held accountable in a very real and personal way. The consequences of one disputant's actions are verbalized by the other disputant at a point in time not far removed from the dispute. A student can then realize the impact of his or her actions on the feelings of other people. There are no more impersonal enforcements of school rules, impersonal breakings of school rules, impersonal assaults, impersonal defacements of school properties; every action affects somebody other than oneself.

This empowerment coupled with more responsive accountability or recognition of consequences learned from participation in the school-based mediation program demonstrates the worth of all individuals, including the at-risk student. The at-risk student is not viewed as "bad" in

110. See Yudof, *supra* note 4, at 893, (espousing the view that a "well-functioning public school system [will maintain] a point of equilibrium or balance [between the formal] and less formal means of social control").

the process and is treated as an autonomous person with the ability to control his or her environment. Blaming or labeling is not necessary when the solution is based on a collaborative or shared recognition and appreciation of the problem.¹¹¹

Another benefit of mediation is the encouragement of ventilation in the process. Ventilation is the venting of strong emotions or feelings that might otherwise be repressed. Often, the ventilation can uncover hidden interests of the parties. Mediation also allows for the mediator to neutralize the message behind the ventilation in a way it can be accepted or at least heard by all parties. Mediation provides a format for the school to respect the at-risk students' "emotionality, work with it, channel its creative energy, [and] reward it."¹¹²

The at-risk student should perform better in school with improved communication skills, a feeling of control of one's choices, and self-worth. Hopefully, this will translate not only into fewer problems with the involved at-risk student, but also into less frustration in school by the student, with the student remaining in school through graduation. Even if the at-risk student does not remain in school through graduation or does not improve his or her academic performance, the student should leave the school better equipped to manage in the real world environment.

There will not only be direct benefits to the at-risk population, but also to the teachers and school administrators. A peer mediation program should free up the teachers' and administrators' time that may otherwise be spent handling student conflicts.¹¹³ This time can then be devoted to the other important tasks of schooling. A student-teacher mediation program should enhance all around relationships, rebuilding trust into the education system.¹¹⁴

111. Norman A. Newberg, *A Systems Approach to School Reform*, in 2 READINGS ON EQUAL EDUCATION, QUALITATIVE INVESTIGATION INTO SCHOOLS AND SCHOOLING 62 (Michele Foster ed., 1991).

112. HASKELL & YABLONSKY, *supra* note 37, at 152. The authors discuss the different coping styles of children from a lower socio-economic class versus middle class children. They suggest that, just as psychiatrists have developed techniques for dealing with these children, which acknowledge the children's differences, so should the school system, which instead ignores or acts against them. Mediation is a process that encourages emotionality in a structured format, and as such, surely these authors would agree that ADR should be used to address at-risk issues.

113. Davis & Porter, *supra* note 10, at 127.

114. See Yudof, *supra* note 4, at 893. For further discussion, see *supra* note 105.

V. WHAT THE SCHOOLS ARE DOING

At this point in time, ADR is certainly not new to schools. The ADR movement had reached the schools with growing interest by the early 1980s. The National Association for Mediation in Education (NAME) formed in 1984 to serve as a clearinghouse and source of information for those interested in mediation in education.¹¹⁵ Various organizations are available to provide training to schools. A growing number of students and school personnel throughout the country are either being trained in or exposed to conflict management techniques and mediation.

Much information has been developed and synthesized from some of these programs. Unfortunately, to date, the "quantitative evidence" does not necessarily support the propositions set forth in this article, as much as the "qualitative and anecdotal evidence" does.¹¹⁶ However, the "quantitative evidence" does not negate the propositions.¹¹⁷ Most of the negatives of ADR programs in the schools stem from issues of implementation and support from resources. Obviously, for any program to succeed and withstand the test of time, it needs sufficient institutional support. Accordingly, the positives outweigh the negatives until empirical evidence can prove otherwise.¹¹⁸ It is doubtful that it will.

In evaluation of their own programs, not all of the schools have had identical evaluation goals or even identical programs.¹¹⁹ The individual programs range from peer mediation to student-teacher mediation to administrative mediation of students' disputes with the school

115. All schools and school personnel interested in developing and maintaining school mediation programs should join NAME, 425 Amity Street, Amherst, Massachusetts 01002, (413) 545-2462. As cited in their brochure, "The ABCs of Conflict Resolution": "NAME is the primary national and international clearinghouse for information, resources, technical assistance, and training in the field of conflict resolution in education." See also Davis & Porter, *supra* note 10, at 123 n.8.

116. LAM, *supra* note 74, at 38.

117. *Id.*

118. Compare with CHARLES T. ARAKI ET AL., RESEARCH RESULTS AND FINAL REPORT FOR THE DISPUTE MANAGEMENT IN THE SCHOOLS PROJECT (University of Hawaii at Manoa Program on Conflict Resolution ed., 1989). The report concluded that although "[t]he mediators, disputants, administrators of project schools, project counselors, and project coordinator and assistant felt that the mediation project had positive effects on their respective schools' climate . . . the data did not show a statistical change." *Id.* at 129. This absence of positive quantitative evidence did not equate into negative quantitative evidence, as the report, overall, is a favorable endorsement of school mediation.

119. See LAM, *supra* note 74, for the various evaluation goals of 14 different programs, including one from Canada. Some were more specific and detailed than others. Some addressed the at-risk population specifically or elements of such, including self-concept/image, academic performance, disciplinary problems.

or between personnel.¹²⁰ Some of the programs are limited to specific types of disputes such as disciplinary problems involving name-calling, harassment, and bullying.¹²¹ Mediation has been touted by some as a better alternative, if not replacement, to the current legalistic due process requirements attached to the resolving of special education and disciplinary disputes, and some schools have adopted such programs.¹²² Some programs exclude specific types of disputes, such as assaults, assaults with injury, involvement with weapons, and student-teacher disputes.¹²³ Some of the programs only allow the "good" students to be mediators, meaning at-risk students would most likely not be trained as mediators.¹²⁴ Other programs embrace the concept of "negative leaders" as mediators and would include at-risk students as mediators as a matter of sound policy.¹²⁵

The 1993 legislative season has shown some activity in the states to embrace the concept of ADR or conflict resolution in the schools. A proposed Connecticut bill mandates the establishment of a "clearinghouse of information, curricula and model programs . . . and that funds be provided to the department [of education] for the establishment of creative curricula and programs that address conflict management and the issue of violence in the public schools."¹²⁶ The Connecticut bill also specifically mentions peer mediation.¹²⁷ A proposed New Mexico bill provides for the appropriation of monies to fund "school mediation programs that reduce incidents of school violence and mediate truancy and family related

120. NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, PRACTICE & POLICY* 207-08 (1989).

121. *See, e.g.*, ARAKI et al., *supra* note 118, at xii, 128.

122. *See, e.g.*, Goldberg & Kuriloff, *supra* note 4, at 496 (noting that mediation has been favorably received in Massachusetts and California); McMasters, *supra* note 62. Additionally, some states have incorporated mediation provisions in their laws relating specifically to special education. *See, e.g.*, MINN. STAT. ANN. § 120.17 subd. 3b.(d) (West 1993); N.H. REV. STAT. ANN. § 186-C:24 (1993); *see also* Linda R. Singer & Eleanor Nace, *Mediation in Special Education: Two States' Experience*, 1 J. DISP. RESOL. 55 (1985).

123. *See, e.g.*, ARAKI et al. *supra* note 118, at xii, 128.

124. *Cf.* MCCORMICK, *supra* note 35, at 71 (commenting on the committee selection process of "non-trouble makers" as an "implementational inadequacy"); *see also* LAM, *supra* note 74 (noting the absence of a reference to utilize negative leaders or at-risk students in seven out of fourteen reporting schools).

125. *See, e.g.*, MCCORMICK, *supra* note 35, at 43; LAM, *supra* note 74, at 3, 5, 16, 19, 25 and 28.

126. H.B. 6353, Jan. Sess., 1993 Conn. Laws.

127. *Id.*

problems impacting children's school behavior and performance."¹²⁸ Both of the proposed bills not only embrace the concept of conflict resolution in the schools, but also the importance of funding such programs. The bills provide some encouragement for the schools in their respective states to embrace the concept of conflict resolution in their curricula.

Generally, there is much activity going on in piecemeal fashion within various school districts, and there is beginning to be recognition of the value of conflict resolution at the legislative level in some states. Little has been done systematically to incorporate ADR or mediation programs to specifically address the at-risk student issue. This does not mean it has been completely ignored. The Tucson, Arizona project mentioned previously sought to address the effect of peer-mediation on the at-risk population. Its conclusions are encouraging for the support of an ADR and At-Risk Students Program.¹²⁹

VI. WHAT SCHOOLS SHOULD DO

All schools are challenged to successfully address the issue of students at-risk of failure or dropping out or both. The federal government, state governments, school boards, school administrators, and teachers face this issue daily. Schools should implement a peer-mediation and a student-teacher mediation program to help meet this challenge.

The programs should be adopted across the board for all schools from grades four through twelve. This is particularly important for all alternative schools, which will be discussed below. This will require the appropriate commitment of resources to implement and continue the programs. The program must be properly administered by qualified personnel, and disputes likewise must have a mechanism for being referred to the program's mediators. There should be ongoing training of student and adult mediators and such training needs to include the at-risk population. Complementary training must be given to all potential participants, such as all at-risk students and all teachers and involved administrative personnel. Program guidelines should be published and distributed. The training and guidelines need to be age-specific. For example, training in grade four will vary in sophistication from training in grade seven.

"[T]he impact of teaching dispute resolution skills to children

128. S.B. 41, 41st Leg., 1st Sess., 1993 N. Mex. Laws.

129. MCCORMICK, *supra* note 35.

certainly will be profound."¹³⁰ This is exactly why the programs need to be adopted by all schools from grade four through twelve. The benefits to the at-risk population will be diluted if the programs are piecemeal or not followed through the varying grade levels. The exposure to conflict management skills, and the continuity thereof, should not depend on the mobility or lack thereof of the at-risk student.

As mentioned above, an ADR program can have an important impact in alternative schools. Many school districts utilize alternative schools to place children who for one reason or another are removed from the regular school environment. The precipitating cause of the removal usually entails one or more of the factors that are used to characterize the at-risk population. While at the alternative school, a student is more at-risk of getting into disputes with fellow students and teachers. It is in this particular environment that a carefully implemented ADR for At-Risk Students Program can have its biggest impact. The program implementation will have its largest concentration focused almost exclusively on at-risk students. These students, for whatever reason, may not have reaped the benefits of the diluted version. The students at the alternative schools most likely have not yet incorporated into their psyches the collaborative style of approaching conflict. These students also probably do not exhibit the compromise or avoidance conflict styles. That means that any student against student dispute will result in a friction of conflict styles. These competing conflict styles will benefit neither student in a dispute. Therefore, with the guidance of training and participation, students should more readily adopt a conflict style that will get them somewhere. The collaborative style is such a vehicle. The student, with enlightened self-interest, will anticipate short-term goals through current collaboration or self-constraint.¹³¹ This adoption of a collaborative model for the sake of short-term goals, if utilized regularly, and once incorporated into their social responses, will at some point benefit the long-term goals of the students and the schools.

The alternative schools also provide a rich environment for student-teacher mediation. Take the example of a student who was sent to the alternative school due to behavioral problems. Her behavior was disruptive to the normal school environment, and she needed to be removed to a school where there was closer supervision of her and like

130. Davis & Porter, *supra* note 10, at 122.

131. This analogy is borrowed from Arthur L. Stinchcombe's discussion on the cause of rebellion, HASKELL & YABLONSKY, *supra* note 37 and accompanying text, *supra* note 66. Additionally, the literature of the problem solving theory of negotiation, which is akin to interest-based mediation, recognizes the element of self-interest in seeking mutual interests. See, e.g., MURRAY et al., *supra* note 102, at 83-84.

students. This behavior problem will not go away because of a change in schools. Control by conventional means such as punishment, extra work, and suspensions, did not work before. During the first week at the alternative school, the teacher asks the student to sit down and to be quiet. The student mouths off. The student is grabbed gently by the arm and taken outside the classroom by the teacher and directed to the principal's office. At that time the student, out of frustration, anger or some unknown reason, shoves the teacher saying "get out of my way" as she walks to the principal's office. A few scenes later, the student is talking to her court-appointed attorney about the assault on the teacher, with which she is now charged. Not only facing suspension or expulsion, she is now facing criminal charges. All of this is going to require some time out of school. She gets further behind and is at risk of failure and or dropping out.

This scene would not have had to play out this way if a student-teacher mediation program had been in place. The student could have been referred to the office of the mediator or third party neutral to discuss the possibility of working through the dispute with the teacher. This may not have prevented the shove, but the neutral, in explaining the process, would advise the student of all the options available to her and to the school for dealing with the disruption and the assault. The student meets head on the consequences of her action and has a choice in facing them. If she chooses mediation, a session would be scheduled quickly while also accommodating the teacher's schedule. The teacher, in a less threatening and charged atmosphere, can explain to the student the consequences of the student's disruptions and the impact on other students. The teacher can also explain school policies, his or her own goals, frustrations, fears, and feelings of not being respected.

The student will then be given an opportunity to respond to what the teacher said and to talk about her actions. Perhaps she is upset at having to come to a new school or feels she has been labeled as no good. Maybe her brothers are teasing her for having to go to the school. The teacher, with or without the mediator's facilitation, could then address the student's concerns. The teacher could convey alternative schooling as a positive experience and convince her that she should not let others bring her down, that she has value, that the school can actually work with her to make her better, and that she can work with the school to make the school a better place. The student hopefully will become more aware of her actions and the accompanying consequences and will also better understand the school's point of view. The agreement could vary, but one could be fashioned that would establish some mechanism for recognizing the onset of the disruptive behavior. The student would ask and be allowed to go to the counselor's office before she disrupted the class, and the teacher with

heightened awareness of the individual student's concerns would begin to address those appropriately.

The program has allowed the school to take back its disputes instead of automatically referring them to the juvenile justice system. The student has been empowered because she has chosen her own remedy. The teacher has a clear understanding as to what this particular student's needs and interests are. The student has a better understanding of the school's goals and policies and how they relate directly to her. The communication between student and teacher, the education process, is re-connected. This re-connection probably would not have happened without an ADR program in place.

VII. CONCLUSION

Obviously ADR is not the one answer to the problem of the successful education of at-risk students. The problem is extremely complex and not singularly resolved. Notwithstanding, if the question posed is "Can a school-based mediation program help the at-risk student population to achieve or to become more productive both in the school and later in the work environment?" that answer is "Yes!" However, it can only meet those educational goals as long as there is a continuity and reinforcement in training and participation in the ADR program. This will require dedication from the school in institutionalizing such a program in its curriculum, with the appropriate personnel and commitment of financial resources. Once such a commitment is made, the schools can begin to address and to meet some of their educational goals in relation to the at-risk population in a more meaningful manner.